IN THE UNITED STATES BANKRUPTCY COURT

FOR THE WESTERN DISTRICT OF NORTH CAROLINA

CHARLOTTE DIVISION

In re:	)	Chapter 11
	)	
GS Industries, Inc. et al.,	)	Case No. 01-30319 (GRH)
	)	
Debtors.	)	Jointly Administered
	)	

ORDER DENYING MOTIONS FOR CLASS CERTIFICATION AND DISALLOWING CLASS PROOFS OF CLAIM

This matter is before the court on three motions for class certification ("Class Certification Motions") and three purported "class" proofs of claim ("Burgess Class Proofs of Claim") filed on behalf of various purported class members related to three lawsuits pending in South Carolina state court (collectively referred to as the "Burgess Plaintiffs"). The debtors and the Official Committee of Unsecured Creditors (the "Committee") timely objected to the Class Certification Motions and the Burgess Class Proofs of Claim. A hearing was held on September 12, 2001. Jurisdiction is proper pursuant to 28 U.S.C. §§ 157 and 1334. The court has considered the parties' pleadings, the record in this case, and the arguments of counsel.

For the reasons stated below, the court has concluded that the Class Certification Motions should be denied and the Burgess Class Proofs of Claim disallowed and expunged.

FACTS

1. In June and July 1998, three purported class actions--Burgess v. Georgetown Steel Corp., Case No. 98-CP-22-385; Cunningham v. Georgetown Steel Corp., Case No. 98-CP-22-414; and Hutchins v. Georgetown Steel Corp., Case No. 98-CP-22-450 (collectively referred to as the "Burgess Litigation")--were filed against Georgetown Steel Corporation ("GSC") in South Carolina state court alleging property damage purportedly caused by "mill dust" from GSC's Georgetown, South Carolina steel mill. According to the complaints, the "mill dust" "causes immediate and severe damage" to the relevant property "by pitting and destroying the paint, chrome, finish, [woodwork, brick], windows, and other parts of the [structure]" and "causes permanent discoloration to the areas to which it attaches and causes severe deterioration to the structure." The proposed classes were, respectively, real property owners, car owners, and boat owners within a five-mile radius of GSC's facility. No motion for class certification was ever filed in the state court actions, and no class was certified.

2. Local newspapers[1] printed numerous articles[2] about the

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[1] The Georgetown Times is the local newspaper in Georgetown, South Carolina, the location of the GSC steel mill and of the putative class plaintiffs. The Myrtle Beach Sun-News is a local newspaper. Both papers are of general circulation in Georgetown, South Carolina.

[2] See "Steel mill civil suit pending," The Georgetown Times, at 1 (June 8, 1998); "Steel mill under fire," The Georgetown Times, at 1 (June 19, 1998); "Neighbors of steel mill file lawsuit," The

Burgess Litigation, and according to the lead named plaintiff in the Burgess action, "[t]here was a lot of publicity about the lawsuits just prior to and after they were filed."

3. On February 7, 2001 (the "Petition Date"), the debtors filed voluntary Chapter 11 petitions.

4. On May 11, 2001, the debtors filed a motion to establish July 27, 2001, as the bar date for filing proofs of claim. No party in interest objected, and the court entered a May 30, 2001, order establishing July 27, 2001 as the bar date.

5. As part of the bar date notification process, the debtors compiled a list of all known real property owners within a five-mile radius of GSC's plant. This list was incorporated into the mailing matrix of parties who were to receive notice of the bar date.

6. During the first week of June 2001, Bankruptcy Services, LLC--as servicing agent for the debtors--sent proof of claim forms and notice of the bar date to 28,574 creditors and

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Myrtle Beach Sun-News, at 1D (June 20, 1998); "From ecstasy to agony," The Georgetown Times, at 1 (June 24, 1998); "GSC hit with second lawsuit," The Georgetown Times, at 1A (July 8, 1998); "GSC has given back more than it has taken," The Georgetown Times; "Column on lawsuit draws response from attorney," The Georgetown Times (July 8, 1998); "GSC faces third lawsuit," The Georgetown Times, at 16 (July 17, 1998); "A mill under siege," The Georgetown Times, at 1 (July 20, 1998); "Killing the goose that lays the golden egg," The Georgetown Times (July 31, 1998); "Georgetown Steel requests end to lawsuit," The Myrtle Beach Sun-News (August 29, 1998); "Steel mill requests dismissal of lawsuits," The Georgetown Times, at 1 (August 31, 1998); "Red stain lawsuits on hold," The Georgetown Times (February 27, 2001); "Red Dust a Cloudy Issue," The Myrtle Beach Sun-News, at 1A (March 8, 2001).

parties in interest listed on the debtors' mailing matrix at a cost of approximately $36,000. In addition, Bankruptcy Services published the bar date notice in seven newspapers, including The Georgetown Times, and The Myrtle Beach Sun-News, at a cost of $16,583.24.

7. After the bar date notices were mailed, The Georgetown Times ran several articles informing potential creditors of the Bar Date and the need to file proofs of claim. See "Claims deadline set for July 27 in steel mill case," The Georgetown Times, at 1 (July 23, 2001); "Specialists hired to help plaintiffs in 'red stain' suit," The Georgetown Times (July 2, 2001); "Mailboxes filled with GSC notices," The Georgetown Times (June 18, 2001).

8. On June 25, 2001, the named Burgess plaintiffs filed a motion to extend the bar date, and the debtors and Official Committee of Unsecured Creditors objected. The court conducted a hearing on July 11, 2001, and denied the motion. The order denying the extension of the bar date was not appealed.

9. On July 27, 2001, the bar date, the Burgess Plaintiffs filed the instant Class Certification Motions. In addition, proofs of claim were filed on behalf of the Burgess Plaintiffs with Bankruptcy Services, LLC. The Burgess Class Proofs of Claim list as creditors:

State Court Case	Alleged Creditor	Claim Amount
Burgess v. Georgetown Steel Corp., Case No. 98-CP-22-385	"All persons who own real property with improvements (residential or commercial) located within a five (5) mile radius of the Defendant's steel mill located in downtown Georgetown, South Carolina."	$120,000,000.00
Hutchins v. Georgetown Steel Corp., Case No. 98-CP-22-450	"A. All persons who live within a five (5) mile radius of the Defendant's steel mill and own a water-craft. B. Also those persons who own a water-craft and keep, board and/or store a water-craft within a five (5) mile radius of the steel mill."	$40,000,000.00
Cunningham v. Georgetown Steel Corp., Case No. 98-CP-22-414	"All persons who own motor vehicles and reside within a five (5) mile radius of the Defendant's steel mill located in downtown Georgetown, South Carolina."	$24,000,000.00

10. Each of the named plaintiffs in the three lawsuits filed an individual proof of claim, collectively totaling $805,000. Out of the approximately 10,000 potential class members,[3] only about fifty-seven other proofs of claim relating to the Burgess Litigation were filed .

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[3] The Burgess Plaintiffs originally alleged that the class was "comprised of over 15,000 persons." Rule 2019 Verified Statement of Ron Jones, at 3 (April 13, 2001). This number was later amended to total "approximately 10,000 persons." Rule 2019 Verified Statement of Christy Gruenloh, at 3 (September 10, 2001).

11. On August 14, 2001, as part of a telephonic scheduling order, the court bifurcated the proceedings on the class certification issue and permitted counsel for the debtors to file a brief solely addressing *procedural* objections to the Class Certification Motions. The merits of class certification were reserved for briefing and hearing at a later date, as necessary.

12. The debtors filed an objection to the Class Certification Motions and the Burgess Class Proofs of Claim on August 20, 2001.

13. On September 4, 2001, the Committee filed a response joining in the debtors' objection.

14. On September 10, 2001, the Burgess Plaintiffs filed a response to the debtors' objection.

15. The court conducted a hearing on September 12, 2001, at which counsel for the Burgess Plaintiffs, counsel for the debtors and counsel for the Committee presented oral argument.

ANALYSIS

I. Equality and Due Process

A. Notice to Purported Class Members.

16. Notice to the purported class members appears adequate. The debtors spent considerable time and resources to give actual notice of the bar date to all purported class claimants in the Burgess Litigation. Property owners in Georgetown were sent notices and proof of claim forms, and the debtors published notices in the local papers. In addition to the debtors'

efforts, a number of newspaper articles appeared in the local paper discussing the Bar Date and the requirement for filing proofs of claim. In several of these articles, plaintiffs' counsel urged citizens to seek the assistance of counsel if they believed they had a potential claim or face losing their claims forever. See "Claims deadline set for July 27 in steel mill case," The Georgetown Times, at 1 (July 23, 2001).

17. Despite these events, the Burgess Plaintiffs contend that many alleged class members "never received actual notice or constructive notice of the bar date." This allegation is not supported by the record. The Burgess Plaintiffs failed to submit evidence of any purported class member who did not receive notice, and have failed to present any evidence of interest in the amorphous, non-existent class. The only evidence submitted by the Burgess Plaintiffs was the affidavit of Tressa Star Edwards, in which Ms. Edwards stated that she received actual notice from the debtors and filed an individual proof of claim. See Edwards Affidavit (attached to Burgess Plaintiffs' Response Brief).

18. Based upon the actual notices mailed, the manner in which the debtors compiled the mailing matrix, the notices which were published in local and national newspapers, the news stories run by The Georgetown Times, and the lack of evidence to the contrary, the court finds that all alleged members of the purported classes in the three lawsuits received actual and/or

constructive notice of the bar date.

B. Equality among Similarly Situated Creditors.

19. "The policy of the bankruptcy law to treat creditors in the same classifications equally is central to the Bankruptcy Code." In re Superior Siding & Window, Inc., 14 F.3d 240, 243 (4th Cir. 1994). The purported members of the class actions received actual and constructive notice of the bar date and should be held to the same requirements as other creditors. Allowing purported class members who received notice but failed to timely file proofs of claim to participate in a class proof of claim would unfairly extend the bar date for a limited number of creditors. Such a result would contravene the equality mandated by the Bankruptcy Code and unfairly prejudice those creditors who timely filed individual proofs of claim.

20. Several courts have reached a similar result. In In re Bicoastal Corp., 133 B.R. 252 (Bankr. M.D. Fla. 1991), plaintiffs brought a purported class action in federal district court on behalf of all persons who purchased stock during a nine-year period. 133 B.R. at 253. Before a class was certified, Bicoastal filed a Chapter 11 bankruptcy petition. Id. The court established a bar date, actual notice was sent to all parties of interest, and further notice was published in numerous newspapers. Id. at 254. Plaintiffs filed a class proof of claim prior to the bar date, and subsequently filed a motion for class certification. Id. In denying both the motion and the class

proof of claim, the court stated:

> [I]t is without dispute that the 'members' of the purported class received more than ample and adequate notice of the bar date, and they nevertheless failed to timely file their respective claims. Clearly they are now barred to present their individual claims; *to permit the Claimants to file a claim as members of a class would enable them to accomplish indirectly what they could not accomplish directly.*

Id. at 255 (emphasis added).

21. Similarly, in In re Sacred Heart Hospital of Norristown, 177 B.R. 16 (Bankr. E.D. Pa. 1995), the Chapter 11 debtor mailed proofs of claim and notice of the bar date to all former employees and published notice of the bar date in several newspapers. 177 B.R. at 19-20. Shortly before the bar date, an attorney filed a motion seeking class certification of all former hospital employees, and asking leave to file a class proof of claim. Id. After noting that (a) the class had not previously been certified, and (b) all of the purported members of the class had received notice of the bar date, the court stated:

> *Known claimants of all kinds who have received actual notice of the bar date must proceed through the claims process on a level playing field.* Tinkering with an established bar date may raise due process claims of parties who have timely filed claims by originally-established bar dates, since it gives late filers a second bite at an apple which is likely to be less than fully satisfying, and thus effect unfair diminution of the timely filer's share of a distribution. . . . [A class claim and motion] which expands the bar date for notified creditors may itself violate due process.

Id. at 22-23 (emphasis added). The court emphatically denied certification:

> [I]t is manifestly clear that *it would be unwarranted, unfair, and possibly violate the due process rights of other creditors of the Debtor to effectively extend the bar date* to benefit (1) the members of the putative class who failed to exercise vigilance; and (2) the pocketbook of the putative class's counsel, who obviously will seek a contingency fee from all unnamed class members who fail to opt out of the putative class.

Id. at 24 (emphasis added).

22. In re FirstPlus Financial, Inc., 248 B.R. 60 (Bankr. N.D. Tex. 2000) reached the same conclusion under similar facts. After actual and constructive notice of the bar date was sent to all members of the purported class, plaintiffs filed a class proof of claim and sought class certification. 248 B.R. at 66-67. In denying both, the court noted the serious concerns which would arise from recognizing a class proof of claim:

> [W]ere the Court to allow the class proof of claim to stand, such action would allow a second bite at the apple for those creditors who received notice of the bankruptcy filing and of the Claims Bar Date, and who chose not to file. Such a result would be inequitable to the Debtor's other creditors who are bound by the bar date. It would also be inequitable within the proposed class since approximately 2,000 of those people, recognizing their rights and concomitant duties as creditors of the Debtor, filed their individual proofs of claim.

Id. at 60 (emphasis added). See also In re Jamesway Corp., 1997 WL 327105 (Bankr. S.D.N.Y. June 12, 1997) (denying class

certification and class proof of claim because certification would effectively extend the bar date to employees who had not timely filed WARN Act claims without a showing of excusable neglect); In re Texaco, Inc., 81 B.R. 820 (Bankr. S.D.N.Y. 1988) (holding that claims of class members who failed to file individual proofs of claim could not be consolidated into class claim).

23. The due process argument is enhanced in this case because the court has previously denied a request by the Burgess Plaintiffs to indefinitely extend the bar date. The stated purpose for seeking that extension was to review insurance information, not to seek class certification. The Burgess Plaintiffs did not appeal from the order denying the extension. The Class Certification Motions are merely an attempt to re-litigate the denial of the request to extend the bar date.

C. Timing of the Class Certification Motions.

24. The court further finds that the timing of the Class Certification Motions weighs in favor of denial. Ordinarily, certification of a class should be resolved "[a]s soon as practicable after the commencement of an action." Fed. R. Civ. P. 23(c)(1); S.C. R. Civ. P. 23(d)(1). In the present situation, the Burgess litigation was pending since June and July 1998, and the current bankruptcy was ongoing for more than half a year before the Burgess Plaintiffs filed their motions for class certification, which were--even then--only filed on the bar date.

See In re Sacred Heart, 177 B.R. at 24 (noting that timing of class certification motion which "was filed only at the eleventh hour, eleven days before the bar date was to run" weighed heavily against granting class certification); In re FirstPlus, 248 B.R. at 78 (denying motion for class certification on grounds that it was untimely, due to counsel "dragging their feet" on seeking resolution of the class issue). Therefore, the timing of the Class Certification Motions, as well as equality and fairness concerns, support denial of the Class Certification Motions and disallowance of the Burgess Class Proofs of Claim.

II. Proofs of Claim must be filed by a creditor or an authorized agent

A. The Bankruptcy Code and Class Proofs of Claim.

25. Section 501(a) of the Bankruptcy Code permits the filing of a proof of claim by a "creditor or an indenture trustee," but does not provide for class proofs of claim. See In re Allegheny International, Inc., 94 B.R. 877, 879 (Bankr. W.D. Pa. 1988); In re Computer Devices, Inc., 51 B.R. 471, 474 (Bankr. D. Mass. 1985). "Nowhere in the Code is 'creditor' defined as a 'class' or 'representative' of a group or class." In re Baldwin-United Corp., 52 B.R. 146, 148 (Bankr. S.D. Ohio 1985).

26. Bankruptcy Rule 3001(b) permits the execution of the proof of claim "by the creditor or the creditor's authorized agent." The proofs of claim are valid only if executed by an authorized agent of the purported class. For the reasons set

forth below, the proofs of claim were not executed by an authorized agent of the purported class.

B. Agency and assent by the principal.

27. An agency relationship exists only upon manifestation by a principal to an agent authorizing the agent to act on the principal's behalf. See Restatement (Second) Agency § 15 (1957). "Only when an agent has *express authorization* may he file a claim on behalf of another." In re Ionosphere Clubs, Inc., 101 B.R. 844, 852 (Bankr. S.D.N.Y. 1989) (emphasis added). With the exception of the named representatives, who have all filed individual proofs of claim, counsel for the Burgess Plaintiffs have not produced evidence of authorization from the purported class members that would authorize the filing of a proof of claim, nor have they identified the individual members of the class.

C. Timing of agency authority.

28. In order to comply with Bankruptcy Rule 3001(b), the person executing the proofs of claim must have been authorized as an agent at the time of filing the proof of claim. See In re Allegheny, 94 B.R. at 81. "Rule 3001(b) allows a creditor to decide to file a proof of claim and to instruct an agent to do so; it does not allow an 'agent' to decide to file a proof of claim and then inform a creditor after the fact." In re FirstPlus, 248 B.R. at 68 (citation and internal quotations omitted). Requiring prior agency authorization takes into

account the distinction between class action procedures which are designed to create an opt-out membership, and bankruptcy claims procedures which are designed to create an opt-in membership.

29. The Fourth Circuit has not addressed whether a proof of claim may be filed on behalf of a class, let alone a class that has not been certified. Many courts have held that such "class" claims cannot be filed for the reasons discussed above. There are cases, however, that allow such claims in limited circumstances where certain procedures are followed. See, e.g., In re Trebol Motors Distributor Corp., 220 B.R. 500 (1st Cir. 1998) (allowing class proof of claim for previously certified class); In re Charter Co., 876 F.2d 866 (11th Cir. 1989), cert. dismissed 496 U.S. 944 (1990); In re American Reserve, 840 F.2d 487 (7th Cir. 1988). The leading case allowing class proofs of claim is In re American Reserve in which the court held that the proposed representative of an uncertified class may file a proof of claim on behalf of the proposed class. 840 F.2d 493. The court concluded that § 501 of the Bankruptcy Code must be interpreted as providing a non-exclusive list of those persons entitled to file proofs of claims. Id. The basis for that conclusion was (1) that Califano v. Yamasaki, 442 U.S. 682 (1979), requires the court to interpret a federal statute in favor of authorizing class proceedings; (2) interpreting § 501 as containing an exclusive list of the persons authorized to file a proof of claim violates this rule of construction; and (3)

interpreting § 501 as containing an exclusive list would render Rules 3001(b) and 7023 as meaningless. Id. at 492-93. Therefore, the court therefore held that the proposed class representative is an authorized agent of the class *nunc pro tunc* if the court later certifies the class and appoints the putative representative as the class representative. Id. at 493.

30. In re Charter also is widely cited as support for allowing class proofs of claim in bankruptcy. In that case, the claimants obtained class certification from a non-bankruptcy court after filing a proof of claim on behalf of the class, but before the debtor objected to the claim. 876 F.2d at 867-68. The In re Charter court adopted the reasoning of In re American Reserve in holding that a proof of claim on behalf of a class of claimants is valid. Id. at 876. In re Charter can be distinguished from the case at bar, however. First, prior to seeking treatment as a class action by the bankruptcy court, the In re Charter claimants had obtained class certification in district court. Id. at 875. In addition, the In re Charter claimants complied with bankruptcy procedures by filing a Rule 9014 motion to have Rule 7023 apply to the case. Id.

31. While recognizing that some courts have followed the In re American Reserve and In re Charter line of cases, this court declines to do so. First, the presumption of Califano is inapplicable because this proceeding is governed by Rule 9014, which unlike the Federal Rules of Civil Procedure, does not

automatically include Rule 23 class certification. Therefore, interpreting § 501 as an exclusive list does not violate an applicable presumption and does not render Rules 3001(b) or 7023 meaningless. Second, § 501 authorizes the creditor to file a proof of claim. Rule 3001(b), while not expanding the list of those who may file a proof of claim pursuant to § 501, articulates that the filing of a proof of claim is a delegable act, which a creditor may authorize an agent to do. In re FirstPlus, 248 B.R. at 71. The failure to specifically include "authorized agent" in § 501 should not be interpreted as eliminating principles of agency because agency law holds that the conduct of an authorized agent is deemed to be the conduct of the principal. See Restatement (Third) Agency § 1.01 (2001). Finally, interpreting § 501 as prohibiting filing by a proposed representative of an uncertified class does not render Rule 7023 meaningless because class proceedings may occur in other contested matters.

32. Furthermore, interpreting § 501 as a non-exclusive list would create significant of problems of interpretation for the Bankruptcy Code. Many sections of the Code contain lists which are specifically non-exclusive. See, e.g., §§ 330(a)(3); 362(d); 503(b); 1112(b). If Congress had intended § 501 to be a non-exclusive list, it would have used similar language.

33. The plain meaning of Bankruptcy Rule 3001(b) is that an agent must have been authorized at the time the proof of claim

was filed. Black's Law Dictionary defines "authorize" as "to give a legal authority; to empower" or "formally approve; to sanction." BLACK'S LAW DICTIONARY 129 (7th ed. 1999). This language implies that to authorize is to empower prospective--not retroactive--action. By permitting retroactive application of agency status, the Seventh Circuit effectively ignores the plain meaning of the word "authorized." The Fourth Circuit has repeatedly instructed bankruptcy courts to interpret statutory text "in accordance with its plain meaning using the ordinary understanding of words." In re NVR, 189 F.3d 442, 457 (4th Cir. 1999). "Only in those rare instances in which there is a clearly expressed legislative intent to the contrary . . . or in which a literal application of the statute would produce an absurd result, should the courts venture beyond the plain meaning of the statute." In re JKJ Chevrolet, Inc., 26 F.3d 481, 483-84 (4th Cir.1994). Following the clear language of § 501, Rule 3001(b), and the principles of construction mandated by the Fourth Circuit, this court holds that a proof of claim can only be filed by a creditor or by an agent who is authorized to file a proof of claim at the time of filing.

III. Contested Matters and Class Actions

A. Class certification is not ordinarily available in contested matters.

34. Bankruptcy courts have as their principal function to determine in a single collective proceeding the entitlements of

all concerned. In re American Reserve, 840 F.2d at 489. Indeed, by concentrating litigation in a single forum, a bankruptcy proceeding offers the same advantages as a class action. In re Woodward & Lothrop Holdings, Inc., 205 B.R. 365, 369 (Bankr. S.D.N.Y. 1997). A Chapter 11 bankruptcy case "is a concerted business-driven effort to formulate a consensual plan under which creditors can partake of an 'inadequate pie' while leaving the baker intact." Luisa Kaye, The Case Against Class Proofs of Claim in Bankruptcy, 66 N.Y.U. L. Rev. 897, 906 (1991). Therefore, courts should be wary of the high costs of class actions, particularly in bankruptcy cases where the claimants are competing with others for a limited supply of funds. In re American Reserve, 840 F.2d at 489.

> Class actions consume judicial time, putting off adjudication for other deserving litigants; they impose steep costs on defendants, even those in the right. The systemic costs of class litigation should not be borne lightly.

Id. at 490. See also In re Mechem Financial, Inc., 125 B.R. 151 (Bankr. W.D. Pa. 1991) (exercising discretion to deny class proof of claim as unnecessary in bankruptcy).

35. Class certification under Bankruptcy Rule 7023 is not applicable to contested matters unless the court in its discretion directs otherwise. See Bankruptcy Rule 9014, Committee Note (objection to proof of claim creates a contested matter); In re Woodward & Lothrop, 205 B.R. at 369 (noting that

for a class action claim to proceed, the bankruptcy court must direct Rule 23 to apply). The majority of courts that have addressed the issue have held that the filing of a motion requesting the application of Rule 7023 is mandatory. See In re FirstPlus, 248 B.R. at 67 n.5 (collecting cases); see also In re GAC Corp., 681 F.2d 1295, 1299 (11th Cir. 1982) (noting that in the absence of a motion seeking application of Rule 7023, "a class proof of claim could not properly be permitted"); In re Thomson McKinnon Securities, Inc., 150 B.R. 98, 102 (Bankr. S.D.N.Y. 1992) (expunging class proofs of claim when class representative failed to petition for application of Rule 7023). In the absence of such a motion, there is no basis for granting class certification. See Reid, 886 F.2d at 1470-71.

B. Discretionary application of Rule 7023.

36. The bankruptcy court has the discretion not to apply Rule 7023. See, e.g., Reid, 886 F.2d at 1472 (affirming decision of bankruptcy court not to apply Rule 7023); In re Charter, 876 F.2d at 876-77 (remanding to bankruptcy court for exercise of discretion as to whether to apply Rule 7023); In re American Reserve, 840 F.2d at 493-94 (same). Courts have described this discretion as "substantial" and "wide." In re American Reserve, 840 F.2d at 492; In re Bicoastal, 133 B.R. at 256. The burden of proving entitlement to class certification rests on the party seeking certification. See Reid, 886 F.2d at 1471. See also Securities & Exchange Commission v. Aberdeen Securities Co.,

Inc., 480 F.2d 1121, 1128 (3d Cir. 1973) (affirming denial of class certification because "petitioners failed to show that the method they advocated was superior to the procedures being followed by the Bankruptcy Court"). When a court exercises its discretion and does not apply Rule 7023, class claims are denied and expunged. In re Thomson McKinnon, 150 at 102.

37. The bankruptcy court must weigh the relative advantages of class certification in the bankruptcy context, and determine whether certification will "enable the parties and the court to realize the same benefits that class actions confer in civil litigation." In re Woodward & Lothrop, 205 B.R. at 376. See also In re American Reserve, 840 F.2d at 492 (noting that Rule 9014 and Rule 23 give the court substantial discretion to consider the benefits and costs of class litigation).

38. The court finds that in the present case class certification is unwarranted. The existing bankruptcy claims process provides the most efficient procedure for resolution of the approximately seventy-five individual "Burgess claims" filed in this case. The debtors have given both actual and constructive notice to the purported class members, thereby eliminating the major benefit of class certification.

39. The damage alleged by the Burgess Litigation is not latent, such that potential claimants would not be aware of their rights. Rather, the state court complaints describe the "mill dust" as a "constant daily barrage" which causes "immediate and

severe damage" and "requires increased maintenance, constant cleaning, more frequent painting and other cleaning." These claims have been well publicized--yet of the thousands of potential claimants, fewer than seventy-five completed and mailed in the one-page proof of claim form. There is no reason to believe that additional notification procedures for the class would produce a significant number of additional claimants.

40. Moreover, a class action in this context would not be efficient unless the class action claims were settled. Presuming there was not a settlement and litigation resulted in a class-wide judgment against the debtors, the court would then have to proceed to the next step to determine the debtors' liability to each class member. Only after considerable time and effort would the court reach the point that was crossed as of the Bar Date on July 27, 2001.

41. Granting class certification would have a real and prejudicial effect on both the debtors and creditors because of the increased expense to the estate in litigating class action issues and the decrease in the size of the pool for creditors who timely filed a claim. Instead of addressing seventy-five claims relating to alleged real property, motor vehicle, and water-craft damage, the debtors would have to focus on approximately 10,000 alleged claims. It is clear from the debtors' schedules of assets and liabilities filed in this proceeding and based upon the representations of counsel that GSC is insolvent and

distributions to unsecured creditors will be substantially less than par.[4] Due process for all GSC creditors requires a level playing field. Accordingly, the court finds that a class action in this context is without benefit and exercises its discretion in declining to apply Rule 7023.

Conclusion

42. To summarize, the court finds multiple alternative grounds to deny the Class Certification Motions and to disallow the Burgess Class Proofs of Claim, including the following:

a. allowing class proofs of claim would violate due process by extending the bar date for purported class members who received actual and constructive notice, but did not timely file a proof of claim;

b. the proofs of claim were not filed by an authorized agent and are therefore invalid; and

c. class action procedures are without benefit in this matter.

Based upon the foregoing alternative reasons and the exercise of discretion not to apply Rule 7023, it is therefore ORDERED that:

1. The Motion for Class Certification by Guy S. Hutchins, Jr. is DENIED;

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[4] In addition, because the pool available is insufficient to pay all creditors' claims in full, the existing claimants may not fairly represent the proposed class claimants due to potential conflicts between their interests and those of the other claimants.

2. The Motion for Class Certification by John and Mamie Cunningham is DENIED;

3. The Motion for Class Certification by John and Patricia Burgess is DENIED;

4. The Class Proofs of Claim are DISALLOWED; and

5. The Class Proofs of Claim are EXPUNGED from the claims register in this case.

George R Hodges
United States Bankruptcy Judge